85-446

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
_____Term, 1985

ROBERTS ENTERPRISES, INC.,

Appellants,

vs.

KANSAS SECRETARY OF TRANSPORTATION,

Appellees.

APPEAL FROM KANSAS SUPREME COURT
JURISDICTIONAL STATEMENT

William A. Larson
GEHRT & ROBERTS, CHARTERED
P.O. Box 5186
Topeka, Kansas 66605

QUESTIONS PRESENTED

Whether the Kansas Supreme Court improperly held that the Kansas Highway Advertising Control Act, K.S.A. 68-2331, et seq., does not conflict with the First Amendment to the Constitution of the United States.

No.
IN THE SUPREME COURT OF
THE UNITED STATES
October Term 1985

ROBERTS ENTERPRISES, INC.,

Appellant,

vs.

KANSAS SECRETARY OF TRANSPORTATION,

Appellees.

APPEAL FROM KANSAS SUPREME COURT
JURISDICTIONAL STATEMENT

William A. Larson
GEHRT & ROBERTS, CHARTERED
3400 Van Buren, P.O. Box 5186
Topeka, Kansas 66605

Pursuant to Rules 12.3 and 15 of the Rules of the Supreme Court of the United States, Appellant, Roberts Enterprises, Inc., files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Kansas Supreme Court in this case and should exercise such

jurisdiction herein.

QUESTIONS PRESENTED

Whether the Kansas Supreme Court improperly held that the Kansas Highway Advertising Control Act, K.S.A. 68-2331, et seq., does not conflict with the First Admendment to the Constitution of the United States.

TABLE OF CONTENTS

Questions Presented 2

Table of Contents.....3

Table of Authorities.....3

Opinions Below.....4

Grounds of Jurisdiction of Supreme Court.....5

Statute Involved.....6

Statement of the Case.....6

Substantiality of Federal Questions...11

Appendices:

A. Opinion of Kansas Supreme Court;

Roberts Enterprises v. Kansas Secretary of Transportation

B. Opinion Rendered by Judge Adrian Allen, Shawnee County District Court, Division Four; Roberts Enterprises v. Kansas Secretary of Transportation

C. Order on Rehearing

D. Notice of appeal to Supreme Court of United States

E. Highway Advertising Control Act K.S.A. 68-2231 (1972)

TABLE OF AUTHORITIES

Cases:

Bantum Books, Inc., v. Sullivan, 83 S.Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584 (1963);

Erznozik v. City of Jacksonville, 95 S.Ct. 2268, 422 U.S. 205, 45 L.Ed 2d 125 (1975)

Japan Line LTD v. County of Los Angeles, 99 S.Ct. 813, 441 U.S. 434, 60 LEd.2d 336 (1978)

Metro-Media, Inc., v. San Diego, 101

S.Ct., 2882 453 U.S. 490, 69 L.Ed 2d.800 (1981)

Warren Trading Post Company v. Arizona State Tax Commission, 85 S.Ct. 1242, 380 U.S. 685, 14 L.Ed 2d 165 (1965)

Statutes:

28 USC 1257(2)

K.S.A. 68-2231 (1972)

K.S.A. 60-2101(b) (1984)

OPINION(S) BELOW

The opinion of the Kansas Supreme Court appears in Roberts Enterprise v. Secretary of Transportion, State of Kansas, 237 Kan. 276, _____ P.2d_____ (1985) and is included herein as Appendix A (p.15).

The unofficial opinion of Judge Adrian Allen District Court of Shawnee County, Kansas is included herein as Appendix B (p.16).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action for injunctive relief. The judgment of the Kansas Supreme Court was entered on May 10, 1985. A motion for rehearing was denied on May 30, 1985. A timely notice of appeal was filed on July 29, 1985, in the Kansas Supreme Court. The jurisdiction of this Court is invoked under the provisions of Title 28 USC 1257(2).

Cases that sustain the jurisdiction of this Court include Japan Line LTD v. County of Los Angeles, 99 Sp.Ct. 813, 441 U.S. 434, 60 Led.2d 336 (1978), Bantum Books, Inc., v. Sullivan, 83 Sp.Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584 (1963),Warren Trading Post Company v. Arizona State Tax Commission, 85 Sp.Ct. 1242, 380 U.S. 685, 14 L.Ed 2d 165 (1965), Erznozik v. City of Jacksonville, 95 Sp. Ct. 2268,

422 U.S. 205,45 L.Ed 2d 125 (1975).

STATUTE INVOLVED

This case involves the constitutional validity of the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 included herein as Appendix E (p. 19).

STATEMENT OF THE CASE

Roberts Enterprises, Inc., filed a "Petition for Injuctive Relief and Restraining Order" on May 19, 1979, against the Kansas Secretary of Transportation. The Petition stated that Roberts Enterprises, Inc., owns approximately 150 outdoor advertising signs located at various places throughout the state. The Petition further alleged that the Secretary of Transportation issued notices to Roberts Enterprises to remove the signs pursuant to the Highway Advertising Control Act of

1972. On May 21, 1979, the District Court entered an Order enjoining the Secretary of Transportation from removing Roberts Enterprises signs. The Secretary of Transportation then answered, admitting Roberts Enterprises ownership of a large number of signs and alleging that the signs were erected in violation of the Highway Advertising Control Act of 1968. The Secretary of Transportation sought an Order directing Roberts Enterprises to remove the signs or authorizing the Secretary of Transportation to do so at Roberts Enterprises expense.

The District court took up cross-motions for Summary Judgment with reference to three specific signs. Roberts Enterprises Motion was denied and the Secretary of Transportation's Motion was granted as to those signs. Later, the case came before the Court for

resolution of the issues involving the remaining signs. During this period of time the U.S. Supreme Court came down with the case of Metro-Media, Inc., v. San Diego, 101 Sp.Ct., 2882 453 U.S. 490, 69 L.Ed. 2d, 800, (1981). At this point Roberts Enterprises submitted to the District Court that based upon the ruling in Metro-Medica, Inc., v. City of San Diego, supra, the Kansas Highway Advertising Control Act was unconstitutionally overbroad and violated the First Amendment. The parties submitted the matter on briefs based upon stipulated facts. The District Court found that the Highway Advertising Control Act of 1972 was unconstitutionally overbroad and invalid. The Court enjoined the Secretary of Transportation from proceeding to remove

or cause the removal of the signs under the act.

From the district court's order, the Secretary of Transportation took a direct appeal to the Kansas Supreme Court as authorized by K.S.A. 60-2101(b) (1984). The Secretary of Transportation contended that the District court erred in finding that Appellant had standing to challenge the constitutionality of the Highway Advertising Control Act. The Secretary of Transportation further contended that the District Court erred in concluding that the Highway Advertising Control Act was unconstitutional.

The Kansas Supreme Court reversed the judgment of the trial court and held that the Kansas Highway Advertising Control Act did not regulate non-commercial speech and consequently was not in violation of the First Amendment. The Court specifically stated:

> "That for the reasons stated earlier in this Opinion, we hold that the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., as amended, does not regulate non-commercial speech, and non-commercial signs."

The Court further added:

> "As we now construe it, we hold that the act is not in conflict with the First Amendment to the Constitution of the United States, and that the act is constitutional".

237 Kan. at page 284,____p.2d _____(1985). Appendix A (p.15).

Roberts Enterprises readily challenged the constitutionality of the Kansas Highway Advertising Control Act, K.S.A. 68-2231, et seq., as applied. The Kansas Supreme Court sustained its validity as applied. Pursuant to 28 USC 1257(2) a final judgment of a state court is reviewable by appeal where the validity of the state statute is drawn into question on the ground that is repugnant to the constitution, laws or treaties of

the United States and the decision of the State Court is in favor of its validity. The Plaintiff Roberts Enterprises challenged the validity of K.S.A. 60-2231 on the grounds that it was repugnant to the First Amendment. The Kansas Supreme Court upheld the constitutionality of K.S.A. 60-2231, et seq. Pursuant to 28 USC 1257(2) this Court has jurisdiction.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that the Kansas Supreme Court held that the Highway Advertising Control Act, K.S.A. 68-2231 et seq., does not violate the First Amendment of the U.S. Constitution. Roberts Enterprises has challenged the above referenced statute on the grounds that it affords commercial speech greater protection than non-commercial speech and

consequently violates the First Amendment of the U.S. Constitution. The Kansas Supreme Court rejected this argument and upheld the validity of the Highway Advertising Control Act.

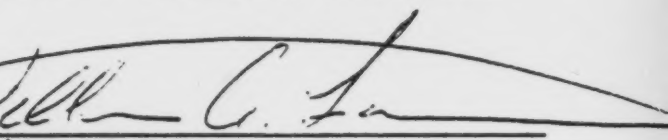
Questions presented in this case are substantial enough to require plenary consideration because of the weight this Court has given to First Amendment Protection of Non-commercial speech. The Kansas Supreme Court has disregarded this court's ruling in Metro Media v. City of San Diego, Inc., supra, where a virtually identical statute was held by this Court to grant commercial speech greater protection than non-commercial speech and consequently violate the First Amendment of the United States. It is extremely important that this Court note jurisdiction in this matter so that proper First Amendment Protection be given to non-commercial speech.

For the reasons stated above, Roberts Enterprises submits that this appeal brings before the Court substantial important federal questions which require plenary consideration with briefs on the merits and oral argument, for their resolution.

Dated August 28, 1985.

Respectfully Submitted,

GEHRT & ROBERTS, CHARTERED

By 

William A. Larson
3400 Van Buren, P.O. Box 5186
Topeka, Kansas 66605
Attorney for Appellant
Roberts Enterprises

CERTIFICATE OF SERVICE

I hereby certify that in accordance with U.S. Supreme Court Rule 28.3 three true and correct copies of the above and foregoing Jurisdictional Statement was deposited in the U.S. Mail, postage

prepaid, on this 28th day of August, 1985, to:

Secretary of Transportation
State of Kansas
State Office Building
Topeka, Kansas 66603

William A. Larson
of GEHRT & ROBERTS, CHARTERED

APPENDIX A

Opinion of Kansas Supreme Court; Roberts Enterprises v. Kansas Secretary of Transportation

No. 56,925

ROBERTS ENTERPRISES, INC.,
Appellee,

v.

SECRETARY OF TRANSPORTATION,
Appellant.

SYLLABUS BY THE COURT

1.

In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

2.

The Kansas Highway Advertising Control Act of 1972, now K.S.A. 68-2231 et seq., is examined and it is held: The Act does not attempt to regulate noncommercial speech or noncommercial signs, does not conflict with the First

Amendment to the Constitution of the United States, and is a constitutional enactment.

Appeal from Shawnee district court: ADRIAN J. ALLEN, judge. Opinion filed May 10, 1985. Reversed and remanded.

David G. Tittsworth, chief counsel, Kansas Department of Transportation, argued the cause and was on the briefs for appellant.

William A. Larson, of Gehrt & Roberts, Chartered, of Topeka, argued the cause and **Shelden Le Bron**, of the same firm, was on the brief for appellee.

The opinion of the court was delivered by

MILLER, J.: This is an appeal by the Secretary of Transportation, defendant, from a final order of the District Court of Shawnee County holding the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., unconstitutionally overbroad and facially

invalid, and enjoining the Secretary from removing any billboards owned by the plaintiff. A direct appeal has been taken to this court as authorized by K.S.A. 1984 Supp. 60-2101(b).

The plaintiff, Roberts Enterprises, Inc., commenced this action by filing a petition for injunctive relief. The petition states that Roberts owns approximately 150 outdoor advertising signs located at various places throughout the state, all of which signs were erected before March 31, 1972. The petition alleges that the Secretary issued notices to Roberts to remove the signs, and the Secretary has threatened and is threatening to remove the signs if Roberts does not do so, pursuant to the Highway Advertising Control Act of 1972.

The district court entered a temporary order restraining the defendant

from removing or threatening to remove any of the signs or billboards until the further order of the court. The Secretary then answered, admitting Roberts' ownership of a large number of signs which were specifically described, and alleging that the signs were erected in violation of the Highway Advertising Control Act of 1968, and are subject to removal without compensation by the Secretary of Transportation, pursuant to K.S.A. 68-2240, because the signs were not lawfully in existence prior to March 31, 1972, the effective date of the 1972 act. The Secretary sought an order directing Roberts to remove the signs or authorizing the Secretary to do so at Roberts expense.

Initially the trial court took up cross-motions for summary judgments with reference to three specific signs. It denied Roberts' motion and granted the

Secretary's motion for summary judgment as to those signs. Later, the case came on before the court for determination of the issues involving the remaining signs. The parties submitted the matter on stipulated facts and briefs. The trial court upheld the Highway Advertising Control Act of 1968, but found that the Highway Advertising Control Act of 1972 was unconstitutionally overbroad and facially invalid, and it enjoined the Secretary from proceeding to remove or cause the removal of the signs under the act. From this order, the Secretary appeals.

We will first review some of the legislative background and then some of the provisions of the 1972 act. In 1965, Congress amended 23 U.S.C. Sec. 131, providing that federal aid highway funds appropriated on or after January 1, 1968,

could be reduced by 10% to any state which had not made provision for effective control of the erection and maintenance of outdoor advertising displays within 650 feet of the nearest edge of the right-of-way of interstate and primary system highways. This, as could be expected, provided the impetus for Kansas and other states to adopt highway advertising control acts. The 1968 Kansas Legislature adopted the Highway Advertising Control Act of 1968, L. 1968, ch. 346 (later, K.S.A. 1968 Supp. 68-2216 et seq.). That act prohibited the erection or maintenance of outdoor signs, with certain exceptions, within 660 feet of interstate or primary highways. Signs falling within the exceptions were permissible under strict standards and licensing provisions of the act. It also provided for the removal of nonconforming signs and made a violation

of the act a misdemeanor. The 1968 act was repealed by the 1972 legislature, effective March 31, 1972.

The 1972 legislature enacted the current act, the Kansas Highway Advertising Control Act of 1972, which became effective on march 31, 1972. See L. 1972, ch. 251, now K.S.A. 68-2231 et seq. The current act contains many provisions similar to those of the 1968 act, but it does not impose criminal penalties. We will discuss some of the provisions of the 1972 act later in this opinion.

The stipulation of facts entered into by the parties indicates that twelve of the signs initially described by the Secretary have been removed or are otherwise no longer in issue. The size, description, name of the owner or advertiser, or the message displayed is

corrected with reference to thirty signs. Additionally, there are approximately 110 other signs correctly described by the Secretary in his initial listing. The parties agree that the Kansas Highway Commission sought agreement with the United States Department of Transportation under the 1968 act, but agreement was not reached. Also, prior to March 31, 1972, no federal funds were appropriated or available to compensate persons whose signs were removed, and during that time no sign was removed, no compensation was paid, no licenses or permits were issued and no criminal actions were brought. The parties also agree that prior to the enactment of the 1968 act there was no Kansas statute regulating the placement of outdoor advertising billboards or signs.

Although the parties have not entered into a formal stipulation to that

effect, it is apparent--at least for the purposes of summary judgment--that the signs remaining in issue were erected prior to March 31, 1972; that no permits were granted for the erection or maintenance of those signs; and that the signs were either erected after the effective date of the 1968 act, or were nonconforming signs under that act.

The trial court found that the 1968 act is not unconstitutionally vague and indefinite on its face and that there was no substantial merit to the plaintiff's argument that the 1968 act never became effective. The trial court upheld the 1968 act and, as no appeal has been taken from that determination, it becomes the law of the case.

The court then went on to examine the 1972 act, first determining what the court saw as the key issue of whether

Roberts Enterprises has standing to assert the unconstitutionality of the 1972 act as it relates to noncommercial messages. The court found that Roberts does not have noncommercial speech interests which are affected by the statute. It found that the only sign of the plaintiff which it contended bore a noncommercial message was in fact a commercial sign designed to attract tourism business to Salina.

The trial court found that the plaintiff has no protected noncommercial speech interests which would allow it to avoid the third-party standing rule. That rule, correctly stated by the trial court, is that:

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be

taken as applying to other persons or other situations in which its application might be unconstitutional."

United States v. Raines, 362 U.S. 17, 21, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960).

This is also the rule in this state. In **Delight Wholesale Co. v. City of Overland Park,** 203 Kan. 99, 453 P.2d 82 (1969), we said in Syllabus paragraph 1:

"We adhere to the rule that the constitutionality of governmental action can only be challened by a person directly affected and such challenge cannot be made by involving rights of others."

The district court, however, concluded that plaintiff fits within the overbreadth exception to the third-party

standing rule developed in **Thornhill v. Alabama**, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940), and **Broadrick v. Oklahoma**, 413 U.S. 601, 612, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). This exception is recognized in **City Council v. Taxpayers for Vincent**, ____U.S._____, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984):

> "Subsequently, however, the court did recognize an exception to this general rule [the third-party standing rule] for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. This overbreadth' doctrine has its source in **Thornhill v. Alabama**, 310 US 88, 84 L Ed 1093, 60 S Ct 736 (1940). In that case the Court concluded that the very

existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." 80 L.Ed.2d at 782.

The trial court found that Roberts had no noncommercial speech interest--those generally protected by the First Amendment--but, under the overbreadth exception, permitted Roberts to challenge the validity of the statute as overbroad. Roberts based its challenge on the First Amendment, maintaining that challenge on behalf of other persons not before the court whose constitutionally protected speech or expression might be deterred or prohibited by the statute.

The key issue, as we see it, is whether the Kansas Highway Advertising

Control Act of 1972 is designed to and does prohibit noncommercial speech and expression, that which is constitutionally protected by the First Amendment. If the statute is applicable only to commercial advertising and does not apply to noncommercial speech, then we need not determine the standing issue and some of the other issues raised.

We turn to the pertinent provisions of the act. K.S.A. 68-2231 set forth the legislative policy behind the enactment. It reads:

> "The legislature hereby finds and declares: (a) That outdoor advertising is a legitimate, commercial use of private property adjacent to streets, roads and highways, where such commercial use does not conflict with the lawfully

designated use of surrounding property;

"(b) that the erection and maintenance of outdoor advertising billboards, signs, displays, and devices in areas adjacent to interstate highways and primary highways should be regulated in order to protect the public investment in such highways, to promote the recreational value of public travel, to preserve natural beauty and to promote the reasonable, orderly and effective display of outdoor advertising;

"(c) that outdoor advertising is an integral part of the business and marketing function, and an established segment of the

national economy, and should be allowed to operate in business areas, or areas where other commercial use of land is not prohibited, so long as such operation is not in conflict with lawfully imposed restrictions on the use of such areas; and

"(d) that the regulatory standards set forth in K.S.A. 68-2234 are consistent with customary use in this state and will properly and adequately carry out each and all of the purposes of this act; and that more severe restrictions should be imposed only when necessary to protect the lawful objectives and purposes of the people of this

state or of any community of people therein."

Subparagraph (a) speaks of outdoor advertising as "a legitimate, commercial use of private property." "Commercial use" is not defined in the act.

The term "commercial" imports commerce, trade, business, industry or enterprise having financial profit as a primary aim. **Siegel v. City of Oakland**, 79 Cal.App.3d 351, 145 Cal. Rptr. 62 (1978). "Commercial use" implies a utilization in connection with or for the furtherance of a profit-making enterprise.

Subparagraph (c) provides that outdoor advertising "is an integral part of the business and marketing function, and an established segment of the national economy . . ." This reference to outdoor advertising as related to business and marketing, and as a segment

of the national economy, indicates that the legislature intended "outdoor advertising" to be commercial advertising, that having to do with business, trade and industry. The language used does not reflect an intent to include the dissemination of political, societal, religious or doctrinal ideas.

K.S.A. 68-2232(p) defines "sign" or "outdoor advertising." The subsection reads:

> "(p) "Sign' or outdoor advertising' means any outdoor sign, display, device, notice bulletin, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended or used to advertise or inform, any part of the

advertising or informative contents of which is located within an adjacent area, and is visible from any place on the main traveled way or any portion of an interstate or primary highway."

"Adjacent area" is defined in K.S.A. 68-2232 as an area within 660 feet of the nearest edge of the right-of-way on any interstate or primary highway. The signs attempted to be regulated in this act are those within that area. The signs are those intended or used to "advertise or inform." The word "inform" is sometimes synonymous with the word "advertise." Taken in its broadest sense, however, it means to furnish information, to tell, to communicate knowledge. In the context in which it is used, it could mean to furnish commercial knowledge, information about a service or

product, or it could mean the communication of abstract, noncommercial ideas.

K.S.A. 68-2233 prohibits the regulation or maintenance of signs in the "adjacent area" with certain exceptions. All of the exceptions relate to commercial signs except those included in subparagraph (a) which include "**[d]irectional and other official signs,** including, but not limited to, signs pertaining to natural wonders or scenic or historical attractions, which are required or authorized by **law and which comply with regulations which shall be promulgated by the secretary** of transportation. . ." (Emphasis supplied.) This section makes clear that directional and official signs must comply with regulations promulgated by the Secretary. Directional or other

official signs which do **not** comply are prohibited, and do not fall within the exception.

The Secretary argued in the trial court that the statutes should be construed to apply only to signs bearing commercial advertising and in reliance thereon cited the case of **State ex rel. Dept. of Transp. v. Pile**, 603 P.2d 337 (Okla. 1979). The Oklahoma statute construed in that case contained definition of signs similar to that contained in K.S.A. 68-2232 (p), and included the words "advertise or inform." The Oklahoma Supreme Court, construing the statutory language, said:

> "If the statutory definition of sign, outdoor advertising, or outdoor advertising device found in 69 O.S. Sec. 1273(a) including '. . ., or [any] other thing, which is

designed, intended or used to advertise or **inform** . . .' was held to cover non-commercial speech, that interpretation would raise, at least, serious doubts as to its constitutionality. The statute is easily susceptible to the interpretation that it does not cover non-commercial speech. This court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision. **U. S. v. Harriss**, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The trial court has held the non-commercial speech not to be regulated by this statute, has avoided the

spectre of unconstitutionality, and its decision is in all respects AFFIRMED." 603 P.2d at 343.

The trial court here discussed the Oklahoma case and the restrictions placed by the court on the Oklahoma statute, which is virtually identical in relevant terms to the Kansas law. The trial court said:

> "First, the statutory language clearly covers non-commercial messages. The definition of sign covers those that are 'designed, intended or used to advertise or <u>inform</u> . . .' The word 'inform' implies non-commercial messages. Further, under the rule of statutory construction that each word in a statute is presumed to have independent meaning and not be

redundant of other words, this court must assume that the word 'inform' in the phrase 'advertise or inform' means something beyond advertising -- i.e., non-commercial messages in addition to advertising messages. Second, the statute prohibits all signs except those fitting within the specified exceptions, K.S.A. 68-2233, and some of the exceptions are for certain non-commercial messages. This court assumes that the legislature would not have created such exceptions if they were not needed -- i.e., if the statute did not prohibit non-commercial messages generally, no

exceptions would have been needed. The clear implication is that the statute does prohibit most non-commercial signs. The Oklahoma decision ignores the wording and implications of the statutory language out of a desire to uphold the statute. While statutes should be read to uphold their constitutionality if possible, their language should not be ignored completely in pursuit of this goal. Third, the Oklahoma decision was rendered prior to the **Metromedia** decision, which held that an ordinance with similar provisions was overbroad."

The trial court in effect found that the word "inform" must imply the

dissemination of noncommercial messages, otherwise the statute would be redundant. We do not so read it. Both advertise and inform may readily relate to commercial subjects. The legislature may have wished to include not only those which were clearly advertisements, but those commercial messages which simply gave information about available commercial products or services. "Inform" does not necessarily have a noncommercial connotation. With reference to the exceptions in K.S.A. 68-2233, the trial court concluded that the legislature would not have included signs bearing certain noncommercial messages if all such signs were not included within the reach of the statute. Section 2233, however, makes it clear that not all directional and official signs are excluded but only those which conform to

the Secretary's regulations. It thus specifically **includes** directional and other official signs within the sweep of the statute and makes all such signs subject to the regulations promulgated by the Secretary. Further, the signs which are described in (a), while noncommercial, are not the type of noncommercial signs which disseminate ideas. They are not the type of informational signs which are entitled to First Amendment protection.

The third reason advanced by the trial court is that the opinion in **Pile** was issued prior to the announcement of the opinion of the United States Supreme Court in **Metromedia, Inc. v. San Diego,** 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981). While the city ordinance involved in that case bears some similarity to the Kansas Highway Advertising Control Act of 1972, there

are two important differences between the fact situation in that case and in this. Metromedia, Inc., was the owner of a large number of billboards. These were used not only to post commercial messages, but also "to convey a broad range of noncommercial political and social messages." 453 U.S. at 496. Metromedia, unlike Roberts Enterprises, thus had standing in its own right to challenge the provisions of the ordinance on First Amendment grounds. Additionally, there was no restrictive interpretation of the legislation by the California courts. The First Amendment challenge was decided adversely to Metromedia in the state courts and formed the basis for United States Supreme Court review.

The duty of an appellate court, when considering a challenge to

legislation, was concisely stated in **City of Baxter Springs v. Bryant**, 226 Kan. 383, 598 P.2d 1051 (1979):

> "The constitutionality of a statute is presumed, all doubts must resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution." Syl. paragraph 1.
>
> "In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done." Syl. paragraph 2.
>
> "Statutes are not stricken

down unless the infringement of the superior law is clear beyond substantial doubt." Syl. paragraph 3.

"The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching

> the public interest as that is a legislative function with which courts cannot interfere." Syl. paragraph 4.

In **Pile**, the Oklahoma Supreme Court said:

> "This court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision." 603 P.2d at 343.

Under the rules for interpretation of statutes stated in **Bryant** and many earlier cases, we are also under that duty. It is our duty to uphold a statute if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, this court should adopt that construction. **Lakeside Village Improvement Dist. v. Jefferson County**, 237 Kan. 106, ___P.2d ___ (1985).

For the reasons stated earlier in

this opinion, we hold that the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 **et seq.**, as amended, does not regulate noncommercial speech and noncommercial signs. Roberts does not contend that the act is unconstitutional as applied to commercial speech and advertising, and we find no constitutional infirmities in the act in that regard. As we now construe it, we hold that the act does not conflict with the First Amendment to the Constitution of the United States, and that the act is constitutional.

The judgment of the district court is reversed and the case is remanded to that court for further proceedings in conformity with this opinion.

APPENDIX B

Opinion Rendered by Judge Adrian Allen, Shawnee County District Court, Division Four; Roberts Enterprises v. Kansas Secretary of Transportation

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
FOURTH DIVISION

ROBERTS ENTERPRISES, INC. Plaintiff,

vs. 79-CV-666

SECRETARY OF TRANSPORTATION
STATE OF KANSAS, Defendant.

MEMORANDUM DECISION

This is an injunction action commenced by the plaintiff, Roberts Enterprises, Inc., to enjoin the Secretary of Transportation from removing certain outdoor advertising signs owned by the plaintiff and located at various places throughout the state of Kansas.

The parties have stipulated to all of the relevant facts by a written stipulation of facts which was filed in this court November 22, 1982, and a written amendment which was filed December 27, 1982. The parties have also filed briefs in support of their

contentions and submitted the case to this court for decision upon the stipulated facts and briefs.

The court adopts the stipulation of facts, as amended, as its findings of the controlling facts.

The court is of the opinion there is no substantial merit to the plaintiff's argument that the Highway Advertising Control Act of 1968 never became effective nor is there substantial merit to its argument that the 1968 Act is unconstitutionally vague and indefinite on its face, but the plaintiff's argument that the Kansas Highway Advertising Control Act of 1972 is unconstitutional on its face because it violates the First Amendment right of free speech is another matter.

The plaintiff's argument that the Kansas Highway Control Act of 1972, K.S.A. 68-2231, et seq, is on its face an

unconstitutional violation of the First Amendment free speech guarantee is based on the decision of the Supreme Court of the United States in the case of Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed.2d 800 (1981). The plaintiff contends that the act is content-neutral and unjustifiably discriminates between various types of non-commercial speech, similar to the statute held unconstitutional in Metromedia. The secretary contends, however, that the plaintiff does not have standing to assert this constitutional claim and further asserts that the statute, as applied, is not unconstitutional.

The ban on advertising signs (billboards) in San Diego at issue in Metromedia contained two exceptions. The first was for on-site commercial

advertising signs, and the second was for twelve categories of non-commercial messages. 453 U.S. at 494-96, 69 L. Ed. 2d at 806-7. The court analyzed separately the commercial speech and non-commercial speech implications of the ordinance. The regulation of commercial-message signs was upheld under the four-part test developed in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 65 L.Ed. 2d 341 (1980). First, such signs concern lawful activity and are not misleading. Second, the ordinance was aimed at a substantial governmental interest; its purposes were to enhance traffic safety and aesthetic quality. Third, the ordinance directly advanced those interests, and fourth, the statute reached no further than necessary to accomplish these goals. The court held that, while the statute was underinclusive because it allowed on-site

commercial signs, it was still valid in light of the government's broader power to regulate commercial as opposed to non-commercial speech.

The court overturned the statute on the ground that it unjustifiably discriminated between various types of non-commercial messages, stating that, "Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests." The city could not allow certain types of non-commercial signs while prohibiting others, either on-site or off-site. The court explained that the ordinance could not be classified as a reasonable time, place and manner

restriction because it was not content-neutral.

The parties do not dispute that the Kansas Statute is similar to the San Diego ordinance in all relevant aspects regarding both parts of the Supreme Court's analysis. Plaintiff does not contend that the statute's restriction of off-site but not on-site commercial signs (K.S.A. 68-2233 [b&c]) is unconstitutional, see plaintiff's memorandum of December 21, 1982, and does not dispute the Secretary's arguments that this part of the statute is valid under the four-part Central Hudson test. See defendant's Renewed Motion for Summary Judgment, at 31-36; plaintiff's Response to Defendant's Reply Memorandum, at 6-8.

The Secretary, on the other hand, does not dispute that the statute is unconstitutional under Metromedia in its

prohibition of some but not all types of non-commercial messages. See defendant's Renewed Motion for Summary Judgment, at 25, 31-39. Plaintiff argues that the exceptions in K.S.A. 68-2233(a) allowing certain non-commercial signs under "exceptions" renders the statute facially invalid. Further, the statute suffers from the defect in Metromedia of giving commercial speech greater protection than non-commercial, by allowing all on-site commercial signs but not allowing all on-site non-commercial signs. The court held that, "our recent commercial speech cases have consistently accorded non-commercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to non-commercial speech. There is a broad

exception for on-site commercial advertisements, but there is no similar exception for non-commercial speech. . . Insofar as the city tolerates billboards at all [on-site], it cannot choose to limit their content to commercial messages ..." The Kansas Statute is facially invalid in both regards, it discriminates between various types of non-commercial messages; and it affords commercial speech greater protection than non-commercial speech for on-site billboards. Defendant contends only that plaintiff, for various reasons, does not have standing to assert these claims.

The key issue is whether plaintiff has standing to assert the unconstitutionality of the Kansas statute as it relates to non-commercial messages. The Secretary contends that plaintiff only has commercial signs at issue and that as a third party, plaintiff may not

attack the statute on the grounds that it might be unconstitutional with respect to non-commercial speakers. The general rule regarding third party standing was enunciated in United States v. Raines, 362 U.S. 17, 21 (1960):

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Plaintiff contends that it does have non-commercial speech interests which are affected by the statute, and alternatively, that they have legitimate third party standing to challenge the statute on First Amendment overbreadth

grounds.

Plaintiff's contention that it has non-commercial speech interests which are affected by the statute is without merit.

Plaintiffs argue that one sign at issue which advertises the City of Salina is a non-commercial sign. This court feels that such a sign falls within the commercial speech category -- it is designed to attract tourism business to Salina, not to convey a message in a political, religious or other non-commercial sense.

Plaintiff also contends that some of the signs at issue are "Space Available" or blank, and potentially will be rented for the display of non-commercial messages. This claim falls within the rule that, "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus

imagined." Raines, 362 U.S. at 22.

Plaintiff further claims standing to challenge the statute on overbreadth grounds. The court's standing requirements are not constitutionally grounded but rather are "rules of practice," Barrows v. Jackson, 346 U.S. 249, 257, and "can and should be disregarded whenever necessary for the more effective attainment of justice." 16 Am Jur. 2d Constitutional Law, sec. 191, at 597.

The overbreadth doctrine is an important exception to standing rules.

> "...third party standing should be distinguished from the right sometimes granted to a litigant to challenge a statute as overbroad. Such challenges normally are allowed in the first amendment

> area. In overbreadth cases, the litigant challenges a statute on its face because, it is argued, that while a narrowly drawn statute could constitutionally prohibit his activity, the challenged statute is overbroad and appears to include activity which is constitutionally protected. The actual litigant before the court in such cases is injured because the court finds he has a right to be prosecuted only under a statute that is narrowly drawn."

Nowak, Rotunda & Young, Constitutional Law 88 (1983). In NAACP v. Button, 371 U.S. 415, 432 (1963), the court granted standing, explaining that "the instant decree may be invalid if it prohibits

privileged exercises of first amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct." In Lewis v. New Orleans, an ordinance which proscribed the use of "opprobrious language" was challenged by a defendant whose speech was probably unprotected "fighting words." Since "opprobrious language" could include protected speech as well as unprotected "fighting words," the court granted defendant standing to challenge the statute and held that "the section is constitutionally overbroad and therefore is facially invalid." 415 U.S. 130, 134 (1974). The overbreadth doctrine has been recognized in a number of cases, including Young v. American Mini-Theatres, 427 U.S. 50, 59-60; Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Thornhill v. Alabama, 310 U.S. 88, 97

(1940); Raines, 362 U.S. at 22. Plaintiff's challenge to the Kansas statute fits within the general overbreadth doctrine, because the statute extends impermissibly to cover some types of non-commercial speech.

The Secretary contends that, for a variety of reasons, the overbreadth doctrine should not apply in this case.

The Secretary points to some cases which have set forth a "substantiality" requirement for overbreadth challenges. The Broadrick court stated that "...the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. This criteria does not, however, defeat plaintiff's claim. First, the "substantiality" requirement applies primarily to conduct rather than verbal expression. The Broadrick court prefaced

its "substantiality" statement by saying "particularly where conduct and not merely speech is involved..." The requirement seems either non-existent or lax with respect to verbal expression. Second, the overbreadth of the Kansas statute at issue is substantial. The purpose of the doctrine is to protect against an unquantifiable chilling effect of an overbroad statute, Young, 427 U.S. at 60, and it is possible that a significant amount of non-commercial messages are absent from the face of billboards because of an assumption or fear that the statute prohibits them. Particularly with respect to verbal expression, this potential chilling effect is adequately "substantial" to preserve plaintiff's standing.

Another limitation on the overbreadth doctrine is that it usually

is not applied to protect commercial speech. However, this limitation applies only where the inhibited speech is commercial because the limited nature of commercial speech protection generally does not justify infringing on traditional standing rules. (See Ohralik v. Ohio State Bar, 436 U.S. 447, 462-64 [1978]).

The court's statements regarding whether plaintiff must show that the statute is inherently overbroad do not defeat plaintiff's standing here. There is "no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Lewis, 415 U.S. at 133-34. See also Thornhill, 310 U.S. at 98; Bigelow, 421 U.S. at 815-16. The court has stated that the doctrine will not apply if the statute "is readily subject

to a narrowing construction by the state courts." Young, 427 U.S. at 60; Erznozkik v. Jacksonville, 422 U.S. 205, 216; Broadrick, 413 U.S. at 613. This limitation, however, seems to apply to cases where vagueness of the statute's reach gives rise to the overbreadth claim. The Kansas statute's overbreadth does not result from vagueness of statutory language, but rather from its impermissible coverage of some but not all categories of non-commercial messages on roadside signs. Defendant argues that the court could construe the Kansas statute as applicable only to commercial-message signs, relying on the Oklahoma case of State v. Pile, 603 P.2d 337 (1979). The court restricted the application of the Oklahoma statute, which is virtually identical in relevant terms to the Kansas law:

"If the statutory definition of sign, outdoor advertising. to outdoor advertising device found in 69 O.S. sec. 1273(a) including '..., or [any] other thing, which is designed, intended or used to advertise or inform ...' was held to cover non-commercial speech, that interpretation would raise, at least, serious doubts as to its constitutionality. The statute is easily susceptible to the interpretation that it does not cover non-commercial speech. This court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision."

603 P.2d at 343. This court disagrees

with the Oklahoma court's analysis. First, the statutory language clearly covers non-commercial messages. The definition of sign covers those that are "designed, intended or used to advertise or inform ..." The word "inform" implies non-commercial messages. Further, under the rule of statutory construction that each word in a statute is presumed to have independent meaning and not be redundant of other words, this court must assume that the word "inform" in the phrase "advertise or inform" means something beyond advertising -- i.e., non-commercial messages in addition to advertising messages. Second, the statute prohibits all signs except those fitting within the specified exceptions, K.S.A. 68-2233, and some of the exceptions are for certain non-commercial messages. This court assumes that the

legislature would not have created such exceptions if they were not needed -- i.e., if the statute did not prohibit non-commercial messages generally, no exceptions would have been needed. The clear implication is that the statute does prohibit most non-commercial signs. The Oklahoma decision ignores the wording and implications of the statutory language out of a desire to uphold the statute. While statutes should be read to uphold their constitutionality if possible, their language should not be ignored completely in pursuit of this goal. Third, the Oklahoma decision was rendered prior to the Metromedia decision, which held that an ordinance with similar provisions was overbroad.

The Secretary also refers the court to the affidavit of William D. Munson, Administrator of the Kansas Highway Advertising Control Act, that "within his

knowledge and belief the law has never been applied to non-commercial advertising since it was enacted." Defendant's Exhibit A. Defendant contends that, if the statute is not applied to non-commercial messages, no overbreadth claim should lie. This argument is without merit. First, the statute's coverage extends to non-commercial signs, so that the chilling effect which the overbreadth doctrine is designed to prevent still potentially exists regardless of the Secretary's policy. Second, the affidavit does not say that the Secretary has a policy of not enforcing the statute against non-commercial signs, or that it will not so enforce the statute in the future. It only says that it has not been so enforced in the past. Third, even if such a policy was in existence, the

Secretary would be free to ignore or reverse that policy in the future within its statutory authority. Fourth, even if this court was inclined to accept such a policy as proof of statutory narrowness, the policy would have to be manifested more strongly and surely, such as through a Kansas Administrative Regulation to that effect. A mere affidavit would not be a sufficient manifestation of such a policy to save the statute. Finally, it is not necessary to show that the administrator of a statute that is unconstitutionally overbroad with respect to the first amendment has or will actually abuse the authority to deny protected expression -- facial invalidity is sufficient. See Thornhill, 310 U.S. at 97.

The court therefore concludes that the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq. is

unconstitutionally overbroad and facially invalid, and that it may not be invoked as authority for the removal of any of plaintiff's roadside signs by the Secretary.

It is therefore the judgment of the court that the Secretary of Transportation is enjoined from removing any of the plaintiff's signs with or without compensation

This memorandum shall serve as the journal entry.

DATED this _____day of _____, 1984.

_____
Adrian J. Allen, Judge
Fourth Division District Court
Topeka, Kansas

APPENDIX C

Order on Rehearing

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Roberts Enterprises, Inc. Appellee,

v. 84-56925-S

Secretary of Transportation,
State of Kansas, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellee for Rehearing.

DENIED.

Date May 30, 1985

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

APPENDIX D

Notice of Appeal to Supreme Court of United States

IN THE SUPREME COURT
OF THE STATE OF KANSAS

ROBERTS ENTERPRISES, Appellant,

vs. 84-56925-S

SECRETARY OF TRANSPORTATION,
STATE OF KANSAS, Appellee.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Roberts Enterprises, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Order holding that the Kansas Highway Advertising Control Act is constitutional, entered herein on May 10, 1985.

This appeal is taken pursuant to 28 USC Section 1257.

GEHRT & ROBERTS, CHARTERED

By_____
William A. Larson

Shelden Le Bron
3400 Van Buren
P.O. Box 5186
Topeka, Kansas 66605
(913) 266-3650
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was deposited in the United States Mail, postage prepaid, on this _____day of July, 1985, to:

Secretary of Transportation
State of Kansas
State Office Building
Topeka, Kansas 66612

William A. Larson
Shelden P. Le Bron
GEHRT &ROBERTS, CHARTERED
3400 Van Buren
P.O. Box 5186
Topeka, Kansas 66605
ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE
STATE OF KANSAS

ROBERTS ENTERPRISES,

Appellant,

vs. No. 84-5692-5-5

SECRETARY OF TRANSPORTATION,
STATE OF KANSAS,

Appellee.

AFFIDAVIT OF SERVICE

William A. Larson, of lawful age, after first being sworn upon his oath, states:

1. That he is the attorney for the Appellant, Roberts Enterprises, in the case of Roberts Enterprises v. Secretary of Transportation, State of Kansas, Supreme Court of the State of Kansas, Case No. 84-56925-S.

2. That on July 29, 1985 he personally caused to be filed with the clerk of the Supreme Court for the State of Kansas and with the clerk of the District Court of Shawnee County, Kansas, a Notice of

Appeal to the Supreme Court of the United States for the case of Roberts Enterprises vs. Secretary of Transportation, State of Kansas, Supreme Court Case No. 84-56925-S.

3. That further, on the 29th day of July, 1985, he personally caused to be mailed first class mail, postage prepaid, a copy of the beforementioned Notice of Appeal to the Secretary of Transportation, State of Kansas, State Office Building, Topeka, Kansas 66612.

FURTHER THE AFFIANT SAITH NAUGHT.

_____
William A. Larson

Subscribed and sworn before me this _____ day of July, 1985.

_____
Notary Public

My Appointment Expires:_____

APPENDIX E

Highway Advertising Control Act K.S.A. 68-2231 (1972)

68-2210. Interpretation. Nothing in this act shall be construed to abrogate or affect the provisions of any lawful ordinance, regulation or resolution, which are more restrictive than the provisions of this act.

History: L. 1967, ch. 357, § 10; May 4.

68-2211. Agreements with the United States authorized. The Secretary of transportation is hereby authorized to enter into agreements with the United States secretary of commerce as provided by title 23, United States code, relating to the control of junkyards in areas adjacent to the interstate and the primary systems, and to take action in the name of the state to comply with the terms of any such agreement.

History: L. 1967, ch. 357 § 11; L. 1975. ch. 427, § 217; Aug. 15.

68-2212. State salvage board abolished; transfer of powers, duties and functions

to secretary of transportation; **provisions for transition and continuity.** (a) The state salvage board is hereby abolished. All of the powers, duties and functions of the state salvage board are hereby transferred to and conferred and imposed upon the secretary of transportation. The secretary of transportation shall be the successor in every way to the powers, duties and functions of the state salvage board in which the same were vested prior to August 15, 1975. The secretary of transportation shall be a continuation of the state salvage board, and every act performed under the authority of the secretary of transportation shall be deemed to have the same force and effect as if performed by the state salvage board in which such functions were vested prior to August 15, 1975.

(b) On and after August 15, 1975, whenever the state salvage board, or words of like effect, is referred to or designated by a statute, contract or other document, such reference or designation shall be deemed to apply to the secretary of transportation.

(c) All rules or regulations of the state salvage board in existence on August 15, 1975, shall continue to be effective and shall be deemed to be the rules or regulations of the secretary of transportation, until revised, amended, repealed or nullified pursuant to the law.

History: L. 1967, ch. 357 § 12; L. 1974, ch. 348 § 35; L. 1974, ch. 277, §1; L. 1975, ch. 426, § 62; Aug.15.

68-2213. Denial, suspension or revocation of license; appeal. The secretary of transportation may deny the application of any person for a license

under this act and may suspend or revoke a license issued or refuse to issue a renewal thereof. Upon any such denial, suspension, revocation or refusal, the secretary shall immediately notify such person in writing, and upon his or her request shall afford him or her an opportunity for a hearing. The secretary of transportation shall promulgate such rules and regulations concerning the notice and hearing as are deemed necessary. Any applicant or licensee deeming himself or herself aggrieved by any decision of the secretary may appeal to the district court of the county in which the premises are licensed or sought to be licensed are located as provided in K.S.A. 1975 Supp. 60-2101.

History: L. 1967, ch. 357, §13;; L. 1973, ch. 271, § 8; L. 1975, ch. 427, § 218; Aug. 15.

68-2214. Severability. If any clause, paragraph, subsection or section of this act shall be held invalid or unconstitutional it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional clause, paragraph, subsection or section.

History: L. 1967, ch. 357, § 14, May 4.

68-2215. Unlawful junkyard maintenance; penalty. Unlawful junkyard maintenance is intentional operation or maintenance of a junkyard in violation of article 22 of chapter 68 of Kansas Statutes Annotated, and amendments thereto.

Unlawful junkyard maintenance is a class C misdemeanor.

History: L. 1968, ch. 154, § 2; L. 1973, ch. 271, § 9; July 1.

HIGHWAY ADVERTISING CONTROL ACT OF 1968

68-2216 TO 68-2230.

History: L. 1968, ch. 346, §§ 1 to 15; Repealed, L. 1972, ch. 251, § 14; March 31.

Revisor's Note:

New act, see 68-2231 et seq.

HIGHWAY ADVERTISING CONTROL ACT OF 1972

68-2231. Declaration of policy. The legislature hereby finds and declares: (a) That outdoor advertising is a legitimate, commercial use of private property adjacent to streets, roads and highways, where such commercial use does not conflict with the lawfully designated use of surrounding property;

(b) that the erection and maintenance of outdoor advertising billboards, signs, displays, and devices in areas adjacent to interstate highways and primary highways should be regulated in order to protect the public investment

in such highways, to promote the recreational value of public travel, to preserve natural beauty and to promote the reasonable, orderly and effective display of outdoor advertising;

(c) that outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to operate in business areas, or areas where other commercial use of land is not prohibited, so long as such operation is not in conflict with lawfully imposed restrictions on the use of such areas; and

(d) that the regulatory standards set forth in K.S.A. 68-2234 are consistent with customary use in this state and will properly and adequately carry out each and all of the purposes of this act; and that more severe restrictions should be imposed only when

necessary to protect the lawful objectives and purposes of the people of this state or of any community of people therein.

History: L. 1972, ch. 251, § 1; L. 1973, ch. 272, § 1; July 1.

Source or prior law:

68-2216.

68-2232. Definitions. As used in this act the following words and phrases shall have the meanings respectively ascribed to them herein: (a) "Adjacent area" means an area which is adjacent to and within six hundred sixty (660) feet of the nearest edge of the right-of-way on any interstate or primary highway, which distance shall be measured horizontally along a line perpendicular to, or at an angle of ninety (90) degrees to, the center line of the highway.

(b) "Business area" means any part

of an adjacent areas which is at any time (1) zoned for industrial or commercial activities under the authority of any law or by a local zoning authority; or (2) not so zoned, but which constitutes an unzoned commercial or industrial area as herein defined.

(c) "Center line of the highway" means a line equidistant from the edges of the median separating the main traveled ways on a divided highway, or the center line of the main traveled way on a nondivided highway.

(d) "Commercial or industrial activities" means, for the purpose of establishing unzoned commercial or industrial areas, those activities generally recognized as commercial or industrial by local zoning authorities in this state, but excludes the following activities:

(1) Outdoor advertising structures;

(2) Agricultural, forestry, ranching, grazing, farming and related activities, including, but not limited to, wayside fresh produce stands;

(3) Transient or temporary activities;

(4) Activities not visible from the main traveled way;

(5) Activities more than six hundred sixty (660) feet from the nearest edge of a highway right-of-way;

(6) Activities conducted in a building principally used as a residence; and

(7) Railroad tracks and minor sidings.

(e) "Commission" means the secretary of transportation.

(f) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any

other way bring into being or establish; but it shall not include any of the foregoing activities when performed as an incident to the change of advertising message or customary maintenance or repair of a sign structure.

(g) "Freeway" means any primary highway which is either: (1) A controlled-access highway, as defined by K.S.A. 8-1410; (2) a controlled access facility constructed pursuant to K.S.A. 68-1901 et seq., and amendments thereto; or (3) a modern express highway or freeway constructed pursuant to K.S.A. 68-2301.

(h) "Highway" means a highway as defined by K.S.A. 8-1424 and any amendments thereto.

(i) "Interstate highway" means any highway at any time officially designated as a part of the national system of interstate and defense highways by the

secretary of transportation and approved by the appropriate authority of the federal government.

(j) "Local zoning authority" means an incorporated city or a county which is authorized by law to zone areas within its jurisdiction and which has an active zoning authority.

(k) "Main traveled way" means the traveled way of a highway on which through traffic is carried. On a divided highway, the traveled way of each of the separate roadways for traffic is opposite directions is a main traveled way, but said term does not include such facilities as frontage roads, turning roadways or parking areas.

(l) "Maintain" means to allow to exist.

(m) "Primary highway" means any highway, other than an interstate

highway, at any time officially designated as a part of the federal aid primary system by the commission and approved by the appropriate authority of the federal government.

(n) "Roadway" means a roadway as defined by K.S.A. 8-1459 and any amendments thereto.

(o) "Safety rest area" means an area or site established and maintained within or adjacent to the highway right-of-way, which areas is under public supervision or control and for the convenience of the traveling public.

(p) "Sign" or "outdoor advertising" means any outdoor sign, display, device, notice, bulletin, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended or used to advertise or inform, any part of the advertising or informative contents of which is located

within an adjacent area, and is visible from any place on the main traveled way or any portion of an interstate or primary highway.

(q) "Traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders and auxiliary lanes.

(r) "Unzoned commercial or industrial area" means an area which is not zoned by state or local law, ordinance or resolution, and on which there is located one (1) or more permanent structures devoted to a commercial or industrial activity is actually conducted, whether or not a permanent structure is located thereon, and the area along the highway extending outward six hundred (600) feet from and beyond the edge of such activity on both sides of the highway: Provided, That the

unzoned area shall not include land on the opposite side of a freeway or interstate highway from the commercial or industrial activity establishing the unzoned commercial or industrial area, nor shall it include land on the opposite side of any other primary highway, which land is deemed scenic by an appropriate agency of the state. All measurement of distances hereunder shall be from the outer edges of the regularly used buildings, parking lots, storage or processing areas of the commercial or industrial activities, not from the property lines of the activities, and shall be along or parallel to the edge of the highway pavement.

Such term shall not include any areas which is within five hundred (500) feet of any of the following: Public park, garden, recreation area or forest preserve; church; school; any public

museum or historical monument; any safety rest or recreation area which is publicly owned, controlled and maintained pursuant to section 319 of title 23 of the United States code; or any sanitary or other facility for the accommodation of the motorist which is publicly owned, controlled and maintained pursuant to section 319 of title 23 of the United States code. Nor shall such term include any area which is within five hundred (500) feet of any strip of land, an interest in which has been acquired by the state of Kansas for the restoration, preservation or enhancement of scenic beauty, and which is publicly controlled and maintained pursuant to section 319 of title 23 of the United States code.

(s) "Visible" means capable of being seen without visual aid by a person of normal visual acuity.

(t) "Zoned commercial or industrial areas" means those areas which are zoned for business, industry, commerce or trade pursuant to a state or local zoning ordinance or resolution.

(u) "Secretary" means the secretary of transportation.

History: L. 1972, ch. 251, § 2; L. 1975, ch. 33, § 10; L. 1975, ch. 427, § 219; Aug. 15.

Source or prior law:

68-2217

68-2233. Erection or maintenance of signs in adjacent area prohibited, exceptions. After March 31, 1972, and subject to the provisions of K.S.A. 68-2237, no sign shall be erected or maintained in an adjacent area, except the following: (a) Directional and other official signs, including, but not limited to, signs pertaining to natural wonders or scenic or historical

attractions, which are required or authorized by law and which comply with regulations which shall be promulgated by the secretary of transportation relative to their lighting, size, number, spacing and such other requirements as may be appropriate to implement the provisions of this act: Provided, That such regulations shall not be inconsistent with, nor more restrictive than, such national standards as may be promulgated from time to time by the secretary of the department of transportation of the United States, pursuant to subsection (c) of section 131 of title 23 of the United States code;

(b) Signs advertising the sale or lease of property upon which they are located, except that there shall not be more than one (1) such sign which is visible to traffic proceeding in any one

direction on any one interstate or primary highway;

(c) Signs advertising activities conducted on the property on which they are located, including, without limiting the generality of the foregoing, goods sold, stored, manufactured, processed or mined thereon; services rendered thereon; and entertainment provided thereon;

(d) Signs erected in business areas on or before March 31, 1972; and

(e) Signs which are to be erected in business areas an which will comply when erected with the provisions of K.S.A. 68-2234.

History: L. 1972, ch. 251, § 3;, L. 1975, ch. 427, § 220; Aug. 15.

Source or prior law:

68-2218

68-2234. Sign standards; application to local zoning authorities. After March

31, 1972, signs which are to be erected in a business area shall comply with the following standards: (a) General. Signs shall not be erected or maintained which (1) imitate or resemble any official traffic sign, signal or device; or (2) are erected or maintained upon trees or painted or drawn upon rocks or other natural features.

(b) Size. (1) Signs shall not be erected which exceed thirty (30) feet in height, sixty (60) feet in length or twelve hundred (1200) square feet in area, per facing, including border, trim and embellishments, but not including base or apron, supports, and other structural members.

(2) The maximum size limitations shall apply to each sign facing.

(3) Two signs not exceeding six hundred (600) square feet each may be

erected in a facing, side by side or "double decked," and double-faced, back-to-back or V-type signs shall be permitted and shall be treated as one structure with a maximum area of twelve hundred (1200) square feet permitted for each side or facing. To be classified as "back-to-back" there must not be more than fifteen (15) feet between structures or faces, to allow for crossbracing.

(4) The area of any sign shall be measured by the smallest square, rectangle, circle or combination thereof which will encompass the area affect.

(c) Spacing. (1) Signs shall conform to all applicable building codes and ordinances of the city, county or state, whichever is applicable by reason of the locations of said signs.

(2) Signs shall not be erected or maintained in such a manner as to obscure or otherwise physically interfere with an

official traffic sign, signal or device or to obstruct or physically interfere with a driver's view of approaching, merging or intersecting traffic.

(3) Signs visible from a primary highway shall not be erected within the limits of an incorporated city less than one hundred (100) feet, and outside the limits of an incorporated city less than three hundred (300) feet, of another sign on the same side of the highway.

(4) Signs visible from a freeway or interstate highway shall be erected within five hundred (500) feet of another such sign on the same side of the highway, and outside the limits of an incorporated city, no such sign shall be located adjacent to or within five hundred (500) feet of an interchange, intersection at grade or a safety rest area, with such distance to be measured

along the freeway or interstate highway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way.

(5) The minimum distance between two signs prescribed by paragraphs (3) and (4) of this subsection shall be measured along the nearest edge of the pavement between points directly opposite the signs along each side of the highway; but said minimum distance shall not apply to signs described by subsection (a), (b) or (c) of K.S.A. 68-2233, not shall such signs be counted or be used in measuring distances for the purpose of determining compliance with the spacing requirements of this subsection.

(6) The minimum distances between two signs prescribed by paragraphs (3) and (4) of this subsection shall not apply where such signs are separated by a

building, structure, roadway or other obstruction which prevents a view of both signs at the same time by traffic proceedings on any one highway.

(7) Nothing in this subsection shall be construed as preventing the erection of double-faced, back-to-back or V-type signs with a maximum of two (2) signs per facing, as permitted by subsection (b) of this section.

(d) Lighting. (1) Signs shall not be erected which contain, included or are illuminated by any flashing, intermittent, revolins or moving light, except those giving public service information such as, but not limited to, tie, date, temperature, weather or news; steadily burning lights in configuration of letters or pictures are not prohibited.

(2) Signs shall not be erected or

maintained which are not effectively shielded so as to present beams or rays of light from being directed at any portion of the traveled way of any interstate or primary highway and are of such intensity or brilliance as to cause glare or to impair the vision of the driver of any motor vehicle or to otherwise interfere with any driver's operation of a motor vehicle.

(3) Signs shall not be erected or maintained which shall be so illuminated that they obscure any official traffic sign, device or signal, or imitate or may be confused with any such official traffic sign, device or signal.

(e) Application to local zoning authorities. Nothing in this section, or in the act of which this section is amendatory, shall be construed as prohibiting a local zoning authority from controlling the erection, maintenance,

size, spacing and lighting of signs within its jurisdiction in a manner which is not less restrictive than the highway advertising control act of 1972, and any acts amendatory thereof or supplemental thereto.

History: L. 1972, ch. 251, § 4; L. 1973, ch. 272, § 2; July 1.

Source or prior law:

68-2219.

68-2235. Agreements with secretary of U.S. department of transportation. The secretary of transportation is hereby authorized to enter into an agreement with the secretary of the department of transportation of the United States government for the purpose of implementing the provisions of this act, the provisions of the federal highway beautification act of 1965, and any amendments thereto, or with customary

uses and zoning principles and standards which hold and govern in this state.

History: L. 1972, ch. 251, § 5; L. 1975, ch. 427, § 221; Aug. 15.

Source or prior law:

68-2220.

68-2236. Licenses and permits; fees. (a) From and after March 31, 1972, no person shall own or maintain outdoor advertising, except signs described in subsections (b) and (c) of K.S.A. 68-2233, without having a license to do so, which license shall be issued by the secretary of transportation: Provided, That any nonprofit religious, civic or educational organization which only erects signs advertising the existence of and meeting dates and locations of such organization shall be exempt from such licensing requirements. Application for such license shall be made to the secretary of transportation on forms

furnished by the secretary of transportation on forms furnished by the secretary and shall contain such information as the secretary shall reasonably require. Each application and each renewal of the license shall be accompanied by a fee of ten dollars ($10) for each county in which the proposed licensee operates, but not to exceed two hundred fifty dollars ($250). Such licenses shall be valid for a period of one (1) year from the date they are issued and shall be renewed annually upon payment of the prescribed fee. The secretary of transportation shall promulgate reasonable rules and regulations relating to performance bond or liability insurance, or both, to be required as a condition of obtaining and holding a license.

(b) From and after March 31, 1972,

no sign, other than signs described in subsection (b) and (c) of K.S.A. 68-2233, may be erected or maintained in an unzoned commercial or industrial area located outside the corporate limits of any city without first obtaining a permit therefor from the secretary of transportation, or in such an area within the corporate limits of a city without first obtaining a permit therefor from the authority designated by the governing body of such city. An application for a permit shall be on a uniform form provided by the secretary and made available to counties and cities, and shall contain such information as the secretary may reasonable require. Within ten (10) days after receipt of an application containing all required information in due form and appropriately executed, an upon payment of a fee of five dollars ($5) for each such sign, the

secretary or the city authority, as the case may be, shall issue a permit to the applicant for the erection or maintenance of the sign, if such sign is consistent with the provisions of this act: Provided, That the payment of such fee shall not be required for any signs advertising the existence of and meeting dates and locations of any nonprofit religious, civic, or educational organization. Such permit shall be transferable and shall be valid for as long as the sign or any replacement of it exists, if the sign is not changed as to size or lighting. A copy of each application to and permit issued by the city authority shall be filed with the secretary of transportation by the city authority.

(c) From and after March 31, 1972, all signs, or the structures on which

they are displayed, shall have stated thereon the name of the owner thereof.

History: L. 1972, ch. 251, § 6; L. 1973, ch. 272, § 3; L. 1975, ch. 427, § 222; Aug. 15.

Source or prior law:

68-2221.

68-2237. Nonconforming signs. (a) Any sign unlawfully in existence along the interstate system or the federal aid primary system which is not located in a business area and which is not in conformity with the provisions of this act shall not be required to be removed until March 31, 1974. Any other sign which is lawfully erected but which does not conform to this act by reason of a highway being made a part of the federal aid primary or interstate highway system subsequent to March 31, 1972, shall not be required to be removed until the end of the fifth year after it becomes

nonconforming.

(b) Notwithstanding any other provisions of this act, the standards prescribed by this act concerning the size, lighting or spacing of signs permitted in business areas shall apply only to those signs erected subsequent to March 31, 1972.

History: L. 1972, ch. 251, § 7; March 31.

Source or prior law:

68-2222.

68-2238. Compensation for removal of signs. (a) From and after March 31, 1972, just compensation shall be paid upon the removal of any of the following signs which are not then in conformity with the provisions of this act:

(1) Signs lawfully in existence prior to March 31, 1972; and

(2) Signs lawfully existing or

lawfully erected on or after March 31, 1972.

(b) Just compensation shall be paid for the taking: (1) From the owner of such sign, all right, title and interest in and to such sign, and his leasehold related thereto; and (2) from the owner of the real property on which such sign is located immediately prior to its removal, the right to erect and maintain signs thereon, other than those signs described in subsections (a), (b) and (c) of K.S.A. 68-2233; and full compensation therefor shall be included in the amounts paid to the respective owners.

History: L. 1972, ch.#251, § 8; March 31.

Source or prior law:

68-2223.

68-2239. Same; condemnation proceedings; claim and action for compensation. The secretary of transportation may purchase

or otherwise contract for or institute condemnation proceedings pursuant to K.S.A. 26-501 et seq. for the purpose of the removal of the signs described in K.S.A. 68-2238. If the secretary does not institute such condemnation proceedings prior to the removal of such signs, and such signs are removed by the owner upon the written request of the secretary, the person or persons entitled to compensation may file a claim for compensation within one hundred eighty (180) days after removal is completed. Such compensation shall be paid upon presentation to the secretary of such information as the secretary may reasonably require. If the secretary of transportation and a claimant do not reach agreement on the amount of compensation payable to such claimant in respect to any removal within one hundred

twenty (120) days after the filing of such claim, the claimant may institute a civil action in district court to have such compensation determined.

Such action may be commenced in the county where the sign and land are located, in the claimant's county of residence or in Shawnee county, but it must be commenced not later than one (1) year after the filing with the secretary of such claim for compensation.

History: L. 1972, ch. 251, § 9; L. 1975, ch. 427, § 223; Aug. 15.

Source or prior law:

68-2224.

68-2240. Removal of nonconforming signs; notice. From and after March 31, 1972, any outdoor advertising authorized under K.S.A. 68-2233 and 68-2234 which does not conform to the standards and requirements prescribed or authorized by this act, or does not comply with any authorized

exceptions thereto, and any outdoor advertising prohibited by this act and not subject to compensation under other terms of this act, shall be subject to removal by the secretary of transportation. The secretary shall give notice by restricted mail to the owner of the sign, if known, or to the advertiser shown on the sign, ordering him or her to cause the outdoor advertising to comply disregard with the provisions of this act or to remove the prohibited outdoor advertising. If the owner of the sign is known and fails to act within ninety (90) days after mailing of the notice, the department of transportation shall remove the outdoor advertising at the expense of the owner of the sign, if known, and if not, at the expense of the advertiser shown on the sign.

History: L. 1972, ch. 251, § 10; L.

1975, ch. 427, § 224; Aug. 15.

Source or prior law:

68-2225.

68-2241. Acceptance of federal funds. The secretary of transportation may accept any allotment of funds by the United States, or any agency thereof, appropriated to carry out the purposes of section 131 of title 23 of the United States code, and any amendments thereto. The secretary shall take such steps as may be necessary from time to time to obtain from the United States, or the appropriate agency thereof, funds allotted and appropriated pursuant to said section 131 for the purpose of paying the federal government's seventy-five percent (75%) share of the just compensation to be paid to sign owners and owners of real property under the terms of subsection (g) of said section 131 and K.S.A. 68-2238 and 68-2239.

The secretary is authorized to use any funds appropriated to or received by the secretary for matching federal funds or for other lawful purposes of this act.

History: L. 1972, ch. 251, § 11; L. 1975, ch. 427, § 225; Aug. 15.

Source or prior law:

68-2227.

68-2242. Removal of signs subject to availability of federal funds. Notwithstanding any other provision of this act, no sign shall be removed or subject to removal if the federal share of the just compensation to be paid upon removal of such sign is not available to make such payment.

History: L. 1972, ch. 251, § 12; March 31.

Source or prior law:

68-2228.

68-2243. Citation of act. This act

No. 85-446

IN THE
SUPREME COURT
OF THE
UNITED STATES

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

_____ TERM, 1985

ROBERTS ENTERPRISES, INC.,
APPELLANT,

VS.

KANSAS SECRETARY OF TRANSPORTATION,
APPELLEE.

ON APPEAL FROM KANSAS SUPREME COURT

APPELLEE'S MOTION TO DISMISS

BRUCE MILLER
Deputy Attorney General
Second Floor
Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2215

JAY L. SMITH
Staff Attorney
Kansas Department of
Transportation
Room 734-S
State Office Building
Topeka, Kansas 66612
(913) 296-3831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Constitutional Provisions Involved 2

Motion to Dismiss 4

A. This Court is Without Jurisdiction to Hear This Appeal 5

B. Appellant Lacks Standing to Challenge the Constitutionality of the Highway Advertising Control Act 7

C. This Appeal Presents No Substantial Federal Question 12

D. The Judgment of the Supreme Court of the State of Kansas Rests Upon an Adequate State Ground 19

TABLE OF AUTHORITIES

Cases

Broadrick v. Oklahoma,
413 U.S. 601, 37 L.Ed.2d 830,
93 S.Ct. 2908 (1973) 10

Edelman v. Jordan,
415 U.S. 651, 39 L.Ed.2d 662,
94 S.Ct. 1347 (1974) 15

Enterprise Irrigation District v.
Farmers Mutual Canal Co.,
243 U.S. 157, 61 L.Ed. 644,
37 S. Ct. 318 (1917) 21

Eustis v. Bolles,
150 U.S. 361 (1893) 21

Fox Film Corp. v. Muller,
296 U.S. 207, 80 L.Ed. 158,
565 S.Ct. 183 (1935) 21

Fusari v. Steinberg,
419 U.S. 379, 42 L.Ed.2d 521,
95 S.Ct. 533 (1975) 15

Groppi v. Wisconsin,
400 U.S. 505, 27 L.Ed.2d 571,
91 S.Ct. 490 (1971) 7

Herb v. Pitcairn,
324 U.S. 117, 89 L.Ed. 789,
65 S.Ct. 459 (1945) 21

Hicks v. Miranda,
422 U.S. 332, 45 L.Ed.2d 228,
95 S.Ct. 2281 (1975) 18

Honeyman v. Hanan,
300 U.S. 14, 81 L.Ed. 476,
57 S.Ct. 350 (1937) 21

Hortonville District v. Hortonville
Ed. Assoc.,
426 U.S. 482, 49 L.Ed.2d 1,
96 S.Ct. 2308 (1976) 7

Illinois State Board of Elections
v. Socialist Workers Party,
440 U.S. 173, 59 L.Ed.2d 230,
99 S.Ct. 983 (1979) 15

Jankovich v. Indiana Toll Road Comm'n,
379 U.S. 487, 13 L.Ed.2d 439,
85 S.Ct. 493 (1965) 21

Kingsley Pictures Corp. v. Regents,
360 U.S. 684, 3 L.Ed.2d 1512,
79 S.Ct. 1362 (1959) 7

Lakeside Village Improvement District
v. Jefferson County,
237 Kan. 106, 697 P.2d
1286 (1985) 5

Lotze v. Washington,
444 U.S. 921, 62 L.Ed.2d 177,
100 S.Ct. 257 (1979) 14

Lynch v. New York ex rel. Pierson,
293 U.S. 52, 79 L.Ed. 191,
55 S.Ct. 16 (1934) 21

Markham Advertising Co. v. Washington,
393 U.S. 316, 21 L.Ed.2d 512,
89 S.Ct. 553 (1969) 13

McCoy v. Shaw,
277 U.S. 302, 72 L.Ed. 891,
48 S.Ct. 519 (1928) 21

Metromedia, Inc. v. San Diego,
453 U.S. 490, 69 L.Ed.2d 800,
101 S.Ct. 2882 (1981)
. . . . . 6, 14, 15, 16, 17, 18

Murdock v. Memphis,
20 Wall. 590, 22 L.Ed. 429
(1875) 21

Newman Signs, Inc. v. Hjelle,
440 U.S. 901, 59 L.Ed.2d 449,
99 S.Ct. 1205 (1979) 14

New York v. Ferber,
458 U.S. 747, 73 L.Ed.2d 113,
102 S.Ct. 3388 (1982) 11

Petrie v. Nampa and Meridian
Irrigation District,
248 U.S. 154, 63 L.Ed. 178,
39 S.Ct. 25 (1918) 21

Roberts Enterprises, Inc. v.
Secretary of Transportation,
237 Kan. 276, 699 P.2d 479
(1985) 5, 8

State ex rel. Department of
Transportation v. Pile,
603 P.2d 337 (Okla. 1979) 6

Suffolk Outdoor Advertising Co. v.
Hulse,
43 N.Y.2d 483, 373 N.E.2d 263 (1977),
appeal dismissed 439 U.S. 808,
58 L.Ed.2d 101, 99 S.Ct. 66 (1978)
. . . . . 12, 16, 17

Tully v. Griffin, Inc.,
429 U.S. 68, 50 L.Ed.2d 227,
97 S.Ct. 219 (1976) 16

United States v. Raines,
362 U.S. 17, 4 L.Ed.2d 524,
80 S.Ct. 519 (1960) 8

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1, 49 L.Ed.2d 752,
96 S.Ct. 2882 (1976) 16

Washington v. Yakima Indian Nation,
439 U.S. 463, 58 L.Ed.2d 740,
99 S.Ct. 740 (1979) 16

Webb's Fabulous Pharmacies, Inc. v.
Beckwith,
449 U.S. 155, 66 L.Ed.2d 358,
101 S.Ct. 446 (1980) 7

Statutes

K.S.A. 68-2231 et seq.
. . . . . 6, 7, 8, 11, 12, 17, 19, 20

No. _____

In the
SUPREME COURT
of the United States

_____

_____ Term, 1985

_____

Roberts Enterprises, Inc.,

Appellants,

vs.

Kansas Secretary of Transportation,

Appellee.

_____

On Appeal From Kansas Supreme Court

_____

APPELLEE'S MOTION TO DISMISS

The Appellee Kansas Secretary of Transportation moves to dismiss the appeal herein on the grounds that:

1. Pursuant to Supreme Court Rule 16.1(a) the appeal is not within this Court's jurisdiction;

2. Pursuant to Supreme Court Rule 16.1(a) appellant does not have standing to prosecute this appeal;

3. Pursuant to Supreme Court Rule 16.1(b) the appeal does not present a substantial federal question;

4. Pursuant to Supreme Court Rule 16.1(b) the judgment of the Supreme Court of the State of Kansas rests on an adequate non-federal basis.

The Jurisdictional Statement filed by Appellant has fully set forth the facts, Kansas statutes, opinions below, and questions presented in this case. Those matters need not be repeated here.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MOTION TO DISMISS

The Appellee Kansas Secretary of Transportation moves to dismiss the appeal herein on the grounds that the interpretation of the Kansas Highway Advertising Control Act of 1972 as determined by the Kansas Supreme Court is not reviewable by this Court, that Appellant lacks standing to challenge the constitutionality of the Kansas Act, that this appeal presents no substantial federal question and that the decision of the Kansas Supreme Court rests on an adequate and independent construction of a state statute.

A. This Court is Without Jurisdiction to Hear This Appeal.

The Supreme Court of the State of Kansas determined that the Kansas Highway Advertising Control Act of 1972 does not regulate noncommercial speech and noncommercial signs. Roberts Enterprises, Inc. v. Secretary of Transportation, 237 Kan. 276, 284, P.2d (1985). In this decision, the Kansas Supreme Court applied the well-recognized rule of construction which required it to uphold rather than defeat the statute if possible. The Court was bound by the rule that if there is any reasonable way to construe the statute as constitutionally valid, that construction must be adopted. Lakeside Village Improvement District v. Jefferson County, 237 Kan. 106, 697 P.2d 1286 (1985).

It was the position of the Secretary of Transportation at trial that the statutes both as written and as applied should be construed to apply only to commercial signs. In support of this position, the Secretary cited State ex rel. Department of Transportation v. Pile, 603 P.2d 337 (Okla. 1979), wherein the Oklahoma Supreme Court construed similar statutory language, under the above-mentioned rules of interpretation, to apply only to commercial speech. Such a construction was not only proper, but once made, avoided the pitfalls which doomed the San Diego ordinance in Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981).

This Court must accept the construction of the Kansas Act (K.S.A. 68-2231 et seq., as amended) as interpreted by

the Kansas Supreme Court. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980); Hortonville District v. Hortonville Ed. Assoc., 426 U.S. 482, 488, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976); Groppi v. Wisconsin, 400 U.S. 505, 574, 27 L.Ed.2d 571, 91 S.Ct. 490 (1971); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (1959).

Where, as here, the Kansas Supreme Court has construed the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., to apply only to commercial speech, that interpretation is completely nonreviewable by this Court.

B. Appellant Lacks Standing to Challenge the Constitutionality of the Highway Advertising Control Act.

Appellant has no personal standing to challenge the provisions of the Kansas Highway Advertising Control Act of 1972 (K.S.A. 68-2231 et seq., as amended). Roberts Enterprises, Inc. v. Secretary of Transportation, 237 Kan. 276, 283 (1985). This Court has long held that:

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.
>
> United States v. Raines, 362 U.S. 17, 21, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960).

Such is the established rule and the one to be followed in this case. Appellant had only commercial signs in dispute.

Appellee argued before the Kansas Court that absent standing, appellant should not be allowed to challenge the constitutionality of the Act as it

applies to noncommercial signs because appellant's constitutional rights in that area are not at issue. Appellant's only other means of obtaining standing was as a third party. Appellant sought to do this on overbreadth grounds.

Appellant claimed that there was a risk that other persons not before the Court were being deterred or prohibited by the Act from exercising constitutionally protected speech or expression. The Kansas Supreme Court expressly refused to address the issue of third party standing by stating:

> If the statute is applicable only to commercial advertising and does not apply to noncommercial speech, then we need not determine the standing issue and some of the other issues raised.
>
> 237 Kan. at 280.

While the appellee agrees with the holding of the Kansas Supreme Court, the appellee believes that the Court improperly addressed the constitutional issue in this case before determining whether appellant had third party standing.

Appellant in the case at hand fails to qualify for third party standing on overbreadth grounds. For a statute to be overbroad, this Court requires that the statute be substantially overbroad. Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). This Court stated that:

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

New York v. Ferber, 458 U.S. 747, 772, 73 L.Ed.2d 113, 102 S.Ct. 3388 (1982) (footnote omitted).

In the case at hand, no substantial overbreadth was ever proven. Furthermore, the Kansas Supreme Court construed the act to apply to commercial speech only. Such a construction is the type of limitation described in New York v. Ferber. There is, simply put, no third party standing available to appellant.

Because appellant lacks both personal and third party standing to challenge the constitutionality of the Kansas Highway Advertising Control Act (K.S.A. 68-2231 et seq., as amended), this appeal should be dismissed.

C. This Appeal Presents No Substantial Federal Question.

Appellant contends that the issue on appeal is whether the Kansas Supreme Court improperly held that the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., does not conflict with the First Amendment. Jurisdictional Statement, p. 2. More directly stated, appellant contends that the state statutes (K.S.A. 68-2231 et seq.) violate First Amendment rights.

In previous decisions, this Court has dismissed similar constitutional challenges to statutes regulating billboards. In Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), appeal dismissed for lack of a substantial federal question, 439 U.S. 808, 58 L.Ed.2d 101, 99 S.Ct. 66 (1978), the highest court in the State of New

York reviewed a municipal ordinance that distinguished between offsite and onsite billboard advertising, prohibiting the former and permitting the latter. The New York court sustained the validity of the ordinance, finding no regulation as to the content of the speech and ample alternate channels of communication. 43 N.Y.2d at 489. The United States Supreme Court summarily dismissed Suffolk's appeal as not presenting a substantial federal question, rejecting the submission that prohibiting offsite commercial advertising violates the First Amendment.

On several other occasions, this Court has summarily disposed of appeals from state court decisions upholding state restrictions on billboards. In both Markham Advertising Co. v. Washington, 393 U.S. 316, 21 L.Ed.2d 512,

89 S.Ct. 553 (1969), and Newman Signs, Inc. v. Hjelle, 440 U.S. 901, 59 L.Ed.2d 449, 99 S.Ct. 1205 (1979), where the validity of state statutes distinguishing between onsite and offsite commercial billboards within protected areas had been sustained, this Court dismissed the appeal for lack of a substantial federal question. Prior to Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981), this Court's most recent summary disposition of a billboard case came in Lotze v. Washington, 444 U.S. 921, 62 L.Ed.2d 177, 100 S.Ct. 257 (1979). The validity of a state statute requiring removal of billboards expressing political and social views which had been erected at locations where billboards conveying information relating to commercial use of that property would have been permitted was upheld by the

state court. This Court found no substantial question raised by the subsequent appeal.

This Court found probable jurisdiction upon the appeal of Metromedia, Inc., v. San Diego, 453 U.S. at 500. After acknowledging the summary dispositions addressed above, this court stated that:

> As we have pointed out, however, summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-181, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979); Edelman v. Jordan, supra, at 671, 39 L.Ed.2d 662, 94 S.Ct. 1347; see also Fusari v. Steinberg, 419 U.S. 379, 392, 42 L.Ed.2d 521, 95 S.Ct. 533 (1975) (Burger, C. J., concurring). They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the

> subject of previous summary action." Washington v. Yakima Indian Nation, 439 U.S. 463, 477, n 20, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979); see also Tully v. Griffin, Inc.,429 U.S. 68, 74-75, 50 L.Ed.2d 227, 97 S.Ct. 219 (1976); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14, 49 L.Ed.2d 752, 96 S.Ct. 2882 (1976).
>
> 453 U.S. at 500.

A close inspection of the Court's discussion regarding the summary disposition in Suffolk provides the Court's reasoning as to why the question raised in the Metromedia appeal merited the granting of probable jurisdiction. 453 U.S. at 499.

In Metromedia, this Court noted that the definition of "billboard" in Suffolk was narrower than that in the case at hand. 453 U.S. at 499. The Suffolk definition narrowed "billboard" to: "A sign which directs attention to a

business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed." 453 U.S. at 499. The Metromedia definition of "billboard" swept into its scope a broad range of noncommercial speech interests. 453 U.S. at 499. This Court stated that, "Insofar as the San Diego ordinance is challenged on the ground that it prohibits noncommercial speech, the Suffolk case does not directly support the decision below [relying on Suffolk summary disposition]."

No such distinction exists in the case at hand to support disregarding the above-mentioned summary dispositions and noting probable jurisdiction on this appeal. By plain meaning of its language, the Kansas Act (K.S.A. 68-2231 et seq.) does not sweep into its definition of "billboards" broad noncommercial speech

interests. Furthermore, the Supreme Court of the State of Kansas has construed the Kansas Act as not applying to non-commercial speech interests. 237 Kan. at 284.

The above cited appeals which were dismissed for lack of a substantial federal question are to be viewed as decisions on the merits. Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 228, 95 S.Ct. 2281 (1975). The appellee submits that the appeal at hand does not represent a distinction from the previous line of cases, as did Metromedia. Just as the regulation of commercial billboards used for a variety of messages does not present a substantial federal question, as illustrated in the above-cited cases dismissed by this Court, this appeal, involving the same types of messages, does not present such a question. This appeal should be dismissed.

D. The Judgement of the Supreme Court of the State of Kansas Rests Upon an Adequate State Ground.

The Supreme Court of the State of Kansas held that:

> . . . the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., as amended, does not regulate noncommercial speech and noncommercial signs. Roberts does not contend that the act is unconstitutional as applied to commercial speech and advertising, and we find no constitutional infirmities in the act in that regard. As we now construe it, we hold that the act does not conflict with the First Amendment to the Constitution of the United States, and that the act is constitutional.
>
> 237 Kan. at 284.

The sole ground for holding that the Kansas Act was constitutional was the Kansas Supreme Court's construction of the state statute. The Kansas Supreme Court pointed out its opinion that

appellant does not contend that the act is unconstitutional as applied to commercial speech and advertising. The Kansas Supreme Court first decided that no regulation of noncommercial speech occurred under K.S.A. 68-2231 et seq. That Court then correctly determined that the regulation of commercial speech under K.S.A. 68-2231 et seq. does not conflict with the First Amendment to the Constitution.

Historically, this Court has not reviewed a judgment of a state court that rests on an adequate and independent ground in state law. In the case at hand, the Kansas Supreme Court interpreted state law and that interpretation decided the issue of this appeal. Further, this Court has refused to review any judgment until the fact that it does not rest on an adequate and independent ground in state law appears of record.

Accord, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965); Herb v. Pitcairn, 324 U.S. 117, 128, 89 L.Ed. 789, 65 S.Ct. 459 (1945); Honeyman v. Hanan, 300 U.S. 14, 18-19, 81 L.Ed. 476, 57 S.Ct. 350 (1937); Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); McCoy v. Shaw, 277 U.S. 302, 72 L.Ed. 891, 48 S. Ct. 519 (1928); Petrie v. Nampa and Meridian Irrigation District, 248 U.S. 154, 157, 63 L.Ed. 178, 39 S.Ct. 25 (1918); Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 163-166, 61 L.Ed. 644, 37 S.Ct. 318 (1917); Eustis v. Bolles, 150 U.S. 361 (1893); Murdock v Memphis, 20 Wall 590,

22 L.Ed. 429 (1875). Since the non-federal ground in the case at hand is adequate, this Court must decline review.

DATED this 27th day of September, 1985.

Respectfully submitted,

BRUCE MILLER
Deputy Attorney General
for the State of Kansas

JAY L. SMITH
Staff Attorney
Kansas Department of
Transportation

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that in accordance with U.S. Supreme Court Rule 28.3 three (3) true and correct copies of the above and foregoing Appellee's Motion to

Dismiss were deposited in the United States mail, postage prepaid, on this 27th day of September, 1985, to:

William A. Larson
GEHRT & ROBERTS, CHARTERED
3400 Van Buren
P. O. Box 5186
Topeka, Kansas 66605

BRUCE MILLER
Deputy Attorney General
for the State of Kansas